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OFFICE OF PETITIONS

In re Application of
Kilvert
Application No.09/646,261
Filed: September 11, 2000
Attorney Docket No. 7372-2
Title of Invention: Immobiliser Device

ON PETITION

This is a decision on the renewed petition filed November 28, 2003 under 37 CFR 1.137(a).

The petition to revive under 37 C.F.R. § 1.137(a) is **DISMISSED**.

Any request for reconsideration must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR § 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR § 1.137(a)." This is **not** a final agency action within the meaning of 5 U.S.C. § 704.

This above-identified application became abandoned for failure to timely file a reply to the Office Communication indicating petitioner's response to the December 19, 2001 Office Action was non-responsive. The Office Communication mailed on August 23, 2002 set an extendable reply period of one month. This application became abandoned on September 24, 2002. A Notice of Abandonment was mailed on March 19, 2003.

Petitioner states the application was unavoidably delayed due to docket/clerical error. Petitioner contends that the August 23, 2002 Office Communication may have been received by the firm's docketing department but was misplaced before reaching petitioner or the appropriate file. Since petitioner was not aware of the August 23, 2002 Office Communication, petitioner removed the September 23, 2002 date from the docket believing it had already been responded to with the Amendment submitted on June 24, 2002 (certificate of mailing June 19, 2002). In support of the petition, petitioner has provided declarations of Kristie Brand and Charles Meyer.

Petition to revive under 37 CFR 1.137(a)

A grantable petition under 37 C.F.R. § 1.137(a) must be accompanied by:

- (1) the required reply,¹
- (2) the petition fee,
- (3) a showing to the satisfaction of the Director that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable, and
- (4) a terminal disclaimer and fee if the application was filed on or before June 8, 1995 or if the application is a design application.

The instant petition lacks item (3).

As to item (3), the showing of record is not sufficient to establish to the satisfaction of the Director that the delay was unavoidable within the meaning of 37 C.F.R. § 1.137(a).

The Office may revive an abandoned application if the delay in responding to the relevant outstanding office requirement is shown to the satisfaction of the Commissioner to have been "unavoidable." See, 37 C.F.R. § 1.137(a)(3). Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887) (the term "unavoidable" is applicable to ordinary human affairs, and requires no more greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business."); In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913). In addition, decisions on revival are made on a "case by case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). A petition to revive an application as unavoidably abandoned cannot be granted where petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2D 1130 (N.D. Ind. 1987).

While docket/clerical error can be construed as unavoidable, petitioner has failed to provide facts to warrant such a finding. A delay resulting from an error on the part of an employee in the performance of a clerical function may provide the basis provided it is shown 1) the error was the cause of the delay; 2) there was in place a business routine for performing the clerical function which could reasonably be relied upon to avoid errors in its performance and 3) the employee was sufficiently trained and experienced with regard to the function and routine for its performance that reliance upon such employee represented the exercise of due care.

Petitioner has failed to establish that the clerical/docket error was the cause of the delay. The delay was two fold. The first delay occurred due to a presumed misfiling of the Office Communication which was received by petitioner's office. However, the second delay occurred due to the attorney's deletion of the September 23, 2002 due

¹ In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

Petition to Revive Under 37 CFR 1.137(b)

Further correspondence with respect to this matter should be addressed as follows:

By facsimile: (571) 273-8300

By delivery service: U.S. Patent and Trademark Office
(FedEx, UPS, DHL, etc.) Customer Window, Mail Stop Petition
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401 Dulany Street
Alexandria, VA 22314

²Link v. Wabash, 370 U.S. 626, 633-34 (1962).

³Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2d 1130 (D. Ind. 1987); Smith v. Diamond, 209 USPQ 1091 (D.D.C. 1981); Potter v. Dann, 201 USPQ 574 (D.D.C. 1978); Ex parte Murray, 1891 Dec. Comm'r Pat. 130, 131 (Comm'r Pat. 1891).

Telephone inquiries should be directed to the undersigned at (571) 272-3215.

A handwritten signature in black ink, appearing to read "Charlema R. Grant". The signature is fluid and cursive, with a long horizontal stroke at the end.

Charlema R. Grant
Petitions Attorney
Office of Petitions